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IN THE

Supreme Court of the United States

October Term, 1971

JANE KATZ, an infant, by ELAINE FINSILVER, her mother and next friend, IRA RESNICK, an infant, by RHEBA RESNICK, his mother and next friend, CAREY MARVIN, an infant, by VERA MARVIN, her mother and next friend, and GREG GOTTLIEB, an infant, by SYBIL GOTTLIEB, his mother and next friend, on behalf of themselves and all others similarly situated,

Petitioners,

v.

JOHN McAULAY, as President of the Board of Education of the Union Free School District No. 5, Ardsley, New York, and BURT P. JOHNSON, Superintendent of Schools of the Union Free School District No. 5, Ardsley, New York,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LOWELL WADMOND
Attorney for Respondents
14 Wall Street
New York, New York 10005
(212) 732-1040

JOHN M. JOHNSTON
RAYMOND W. VICKERS
PAUL C. ROONEY
WHITE & CASE
Of Counsel

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RESPONDENTS' BRIEF IN OPPOSITION

Question Presented

Was the Court of Appeals correct in upholding a District Court determination that the prohibition of all solicitation of funds on the premises of the public schools of Ardsley, New York, was a regulation reasonably designed

to protect a captive audience of school children from the coercion and embarrassment resulting from financial solicitation pursued within the school by outside fund raising activities?

Rule Involved

Rule 19 of the Rules of the United States Supreme Court is reproduced as Appendix A to this brief.

Statement

On February 6 and 9, 1970, petitioners distributed in the corridors of Ardsley High School a one-page flyer (Pet. pp. 4,5) soliciting contributions for the continuing defense of those involved in what was popularly known as the trial of the "Chicago Seven." They were instructed by the assistant principal of Ardsley High that the distribution of the flyer was in violation of a long-standing policy of the New York Board of Regents and a rule of the Ardsley School Board which prohibits the solicitation of contributions of any kind from children inside the Ardsley High School.

Petitioners moved in the District Court for a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure prohibiting the school officials of Union Free School District No. 5, Ardsley, New York, from interfering with the distribution by the petitioners of the flyer; and from interfering with the solicitation of contributions for other causes.

Petitioners further moved the District Court for a preliminary injunction prohibiting the school officials of Union

Free School District No. 5, Ardsley, New York, from "interfering, directly or indirectly," with (1) the flyer which does in fact solicit contributions and (2) with "the rights of students to express their opinions on matters of public importance," coupled with the right to solicit funds in connection with such matters. It is submitted that the request for this latter relief is so vague that it does not provide a proper basis for injunctive relief; that the request for such relief was not considered by the courts below for this reason; and that the denial of such relief is not properly before this Court.

On May 8, 1970 Judge McLean denied the motion in all respects, finding there was an insufficient likelihood of success on the merits to warrant preliminary relief. In an opinion dated February 11, 1971 the Court of Appeals for the Second Circuit affirmed the District Court's exercise of discretion in denying preliminary injunctive relief; it is this decision petitioners seek to have reviewed by this Court. The opinion of Judge McLean is reproduced in the appendix to this brief as Appendix B. The Second Circuit opinion appears in the Appendix to the Petition at p. 21.

Argument

District Judge McLean denied a preliminary injunction here because petitioners had not demonstrated the probable ultimate success of their claim that the School Board's prohibition of all fund solicitation in elementary and public schools in the Ardsley district was unreasonable and in violation of the First Amendment. The precise issue before this Court is whether this finding was an abuse of discretion.

The Court of Appeals, applying the principles of *Tinker* v. *Des Moines Ind. School Dist.*, 393 U.S. 503 (1969) to the particular facts presented in this case, did not find such abuse. In affirming the District Court's denial of preliminary injunctive relief, the Court of Appeals did not decide any "important question of federal law which has not been, but should be" settled by this Court (Rule 19 of the United States Supreme Court, Appendix A). Nor does there exist any conflict of decision or uncertainty in the law to warrant this Court's exercise of its discretion to issue a Writ of Certiorari to the Court below.

I

The Court of Appeals, following the rationale of *Tinker*, correctly decided that the prohibition of all financial solicitation in school buildings is a reasonable regulation designed to protect a captive audience of school children from uncontrolled fund-raising activity.

The captive audience which a large public high school provides is necessarily an attractive target for those who seek contributions for the widely disparate groups which exist within the community. Over 75 organizations have in the last decade requested permission to solicit contributions upon the school property of Ardsley High School (Affidavit of Burt P. Johnson, Appendix C). To allow the uncontrolled solicitation of contributions would thus subject students to an unrelenting barrage of requests for donations and expose them to the undesirable risk of embarrassment, harassment or coercion should they, for reasons of conscience or penury, not wish to donate. On the other hand, to limit the number of solicitations upon

school property to "worthwhile" activities would require the school board to determine the worthiness of individual fund-raising efforts. The decision to prohibit all solicitations relieves the school officials of this difficult, if not impossible task.

For reasons such as these, the New York Board of Regents decided in 1923 to make it their rule to prohibit solicitation of any kind from the children in the public schools.

Journal of Regents' Meetings, January 25, 1923:

> "*Soliciting Funds of School Children Not Permitted*
>
> The matter of soliciting funds from the pupils in the public schools of the State for different purposes was discussed at length, and, upon motion of Regent Bondy, it was
>
> *Voted* That soliciting funds of children shall not be permitted in the public schools of the State, this provision to take effect on and after March 1, 1923."

This rule was modified in 1940 to permit solicitation of funds by the Junior Red Cross, if the consent of local school authorities could be obtained (Journal of Regents' Meetings, June 20, 1940). It is undisputed that these resolutions, though not included in the official Rules of the Regents, have been treated by the Ardsley School Board as having a binding effect, and as a statement of desirable policy on the part of the Board of Regents.

Since 1958, when the present Superintendent took office, it has been the policy of his office that no solicitations would be allowed in Ardsley public schools. Contrary to petitioners' contention (Pet. p. 14), all organizations, in-

cluding UNICEF, have been subject to this policy. The Junior Red Cross, at one time permitted to solicit funds in Ardsley elementary schools, is no longer permitted to do so (Affidavit of Burt P. Johnson, Appendix C). Judge McLean, accepting these facts as true, found that application of this rule to petitioners in no way discriminated against them (Appendix B, pp. B2, B3).

The Fifth Circuit, in a decision invalidating a regulation which prohibited the wearing of freedom buttons by students, has stated that a state may nevertheless make reasonable regulations for the administration of the schools.

> "In formulating regulations, including those pertaining to discipline of school children, school officials have a wide latitude of discretion. But the school is always bound by the requirement that the rules and regulations must be reasonable. It is not for us to consider whether such rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities." *Burnside* v. *Byars*, 363 F.2d 744, 748 (5th Cir. 1966).

And in *Tinker* v. *Des Moines Ind. School Dist.*, 393 U.S. 503 (1969), this Court, although holding that a school district could not prohibit the wearing of black armbands, nevertheless reiterated that a school district may make reasonable regulations for the behavior of students. In referring to the First Amendment, the Court stated:

> "We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances." 393 U.S. at 513.

No authority whatsoever has been cited by petitioners which stands for the proposition that the prohibition of

the soliciting of funds upon elementary or high school premises is not a reasonable regulation.

In *Sullivan* v. *Houston Ind. School Dist.*, 307 F.Supp. 1328 (D.C. Texas 1969), an underground newspaper there at issue did solicit funds, but the School Board did not have a regulation specifically prohibiting the solicitation of funds, nor did the court in that case address itself to the question whether the School Board could prohibit solicitation of funds. Except for a brief mention in the court's statement of facts, the issue of solicitation was never discussed. Similarly, *Scoville* v. *Bd. of Educ.*, 425 F.2d 10 (7th Cir. 1970) simply did not deal with solicitation. The court there held that high school students could not be disciplined for publicizing views with which the school authorities disagreed.

There is no authority for the general proposition that the solicitations of funds is itself free speech or is a necessary incident of free speech. This Court has held, in a specific factual setting, that the incidental solicitation of funds will not change the otherwise essentially religious character of an act so as to deprive it of the protection afforded the free exercise of religion by the First Amendment. *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943). The holding of this case is, however, expressly limited to the facts there present and cannot be said to be a general pronouncement that solicitation of funds is a necessary incident of free speech. In any event, even a cursory reading of the flyer which petitioners seek to distribute indicates that the solicitation of funds was the primary, and not incidental, reason for its distribution. Finally, even if there were support for a general proposition that the solicita-

tion of funds is a necessary incident of free speech, the Second Circuit has correctly held that this does not prevent a school board from promulgating reasonable regulations designed to limit the risk of embarrassment, coercion and harassment which the solicitation of funds intrinsically entails.

The Court of Appeals, in upholding the District Court, said:

> "Pupils are on school premises in response to the statutory requirement that they attend school for the purpose of formal education. Where outside organizations or individuals espousing various causes seek to take advantage of the required assemblage of secondary school pupils, as a captive audience, to solicit funds, either directly or through the agency of some of the pupils, for their particular project or cause, they are in effect in competition for the time, attention and interest of the pupils with those who are seeking to administer the school system. Whether it is done a few minutes before school opens or a few minutes after, its effect is not so limited in time and it is plainly harmful to the operation of the public schools. If there is no regulation against it, literally dozens of organizations and causes may importune pupils to solicit on their behalf; and it is foreseeable that pressure groups within the student body are likely to use more than polite requests to get contributions even from those who are in disagreement with the particular cause or who are, in truth, too poor to afford a donation. The Board's regulation appears to be reasonable and proper and has a rational relationship to the orderly operation of the school system." (Pet. pp. 26, 27)

Thus the Court of Appeals decision accords with *Tinker's* reading of the First Amendment to "permit reason-

able regulation of speech-connected activities in carefully restricted circumstances" (393 U.S. at 513). Indeed, the Court of Appeals explicitly considered and applied the standards contained in *Tinker* in the determination of the reasonableness of the no solicitation rule applied to petitioners:

> "'Assuming that plaintiffs' activity was 'speech' within the meaning of the First Amendment, school officials had the burden of showing governmental interests which might justify their interference with that 'speech.' *NAACP* v. *Alabama*, 357 U.S. 449 (1958). The Supreme Court has repeatedly affirmed that such an interest lies in the implementation of 'the comprehensive authority of the States and school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' *Tinker* v. *Des Moines Independent Community School District*, *supra* at 507; see *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968). The exercise of such authority may not, however, abridge the free expression of students in the public high schools unless that expression 'materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.' *Tinker* v. *Des Moines Independent Community School District*, *supra* at 509." (Pet. pp. 25, 26)

Under the circumstances of this case, the decision to prohibit all solicitation of contributions is a reasonable regulation aimed at the protection of a captive audience of school children and is rationally related to the orderly operation of the school system. Absent this long-standing regulation, these school children would be subject to the uncontrolled solicitation of unnumbered fund raisers which, as the Second Circuit has concluded, is "plainly harmful to the operation of the public schools" (Pet. p. 26).

II

The limited question before this Court is whether the Ardsley School Board may reasonably prohibit the solicitation of funds in the Ardsley High School.

Petitioners assert a conflict between the decision below and *New Left Education Project* v. *Board of Regents of the University of Texas*, —— F.Supp. —— (W.D. Tex., 1970) prob. juris. post. —— U.S. —— (Oct. Term, 1970, No. 1100). In fact, no conflict exists.

In *New Left* the plaintiffs complained that two rules of the University of Texas Board of Regents prevented the sale of a newspaper called the "Rag" anywhere on the University of Texas Campus; and further operated to prevent the solicitation of monies or dues from potential members of student organizations without prior approval from designated officials. Plaintiffs claimed "That both rules violate[d] their first amendment rights of speech and association because they are overly broad and are mere licensing schemes." The court there held unconstitutional the rules in question as they had been applied by the Texas authorities.

The present case is factually distinguishable from the *New Left* case. In the *New Left* case, the Rules of the Texas authorities had been applied so as to prohibit solicitations and sales of literature to college students anywhere over the entire area of a large university campus. The New York Regents' rule in contrast, seeks to prevent solicitation on the premises of public elementary and high schools of New York State. Substantially different issues are involved in prohibiting distribution of a student news-

paper on a large university campus and prohibiting financial solicitation in public high and elementary schools. It is only by ignoring this, and other factual differences between *New Left* and the instant case, that the existence of a conflict can be argued. The decision in *New Left* is thus not in conflict with the decision of the Second Circuit which, relying on *Tinker*, is directed clearly to the requirements of orderly operation of the schools.

Contrary to petitioners' contentions (Pet. pp. 13-15), the limited question presented here is whether the Ardsley School Board may reasonably prohibit the solicitation of funds in the Ardsley High School. The District Court stated below:

> "It must be borne in mind, however, that we are concerned on this motion with one particular document, a leaflet which contains a plea for financial contributions. There is no claim that defendants have forbidden the distribution of any other document which confined itself to expressions of opinion without a request for money. We are not concerned, therefore, with free speech in the abstract or with broad generalizations about the rights of students to announce their opinions to anyone sufficiently interested to read or listen." (Appendix B, p. B3.)

The Second Circuit, concurring with the District Court's analysis, similarly found it unnecessary to look beyond the Regents' rule "Because the Board of Regents' rule afforded a sufficient basis for the denial of preliminary relief" (Pet. p. 27). The Ardsley School Board, in accord with the rule of the New York Board of Regents, has made it a rule that all solicitations for contributions in the schools of its district are prohibited. Even if this Court were to hold that students had a general right to distribute

written material in the public schools, unless this Court were also willing to hold the School Board's no-solicitation policy unreasonable and thus unconstitutional, the School Board could still properly prohibit the distribution of the flyer here in question. The petitioners, therefore, would not then be entitled to the injunctive relief which they sought. Therefore the attention of this Court should properly be limited to the question whether the prohibition of fund solicitation is a reasonable regulation for the administration of the public schools in Ardsley.

Conclusion

The denial of preliminary relief in this case is a perfectly proper application of the principles laid down by the decisions of this Court to the factual situation presented. The prohibition by school authorities of financial solicitation in the public schools of Ardsley does not infringe important First Amendment rights, nor does the Appeals Court decision give rise to conflicts which this Court must resolve. The Petition does not raise any substantial question meriting consideration by this Court and should accordingly be denied.

Respectfully submitted,

LOWELL WADMOND
Attorney for Respondents
14 Wall Street
New York, New York 10005
(212) 732-1040

JOHN M. JOHNSTON
RAYMOND W. VICKERS
PAUL C. ROONEY
WHITE & CASE
Of Counsel